

China Legal Briefing* 238

February 2014



* CHINA LEGAL BRIEFING is a regularly issued collection of Chinese law related news gathered from various media and news services, edited by WENFEI ATTORNEYS-AT-LAW LTD. distributed to its clients and CHINA LEGAL BRIEFING subscribers.

WENFEI ATTORNEYS-AT-LAW LTD. does not accept responsibility for accuracy of quotes or truthfulness of content. CHINA LEGAL BRIEFING is not intended to provide advice.

- 1. SPC Offers More Protection to Food, Drug Consumers**
- 2. MOFCOM Loosens Control on Cross-border RMB Direct Inbound Investment**
- 3. CSRC Issues Measures to Strengthen IPO Supervision**

1. SPC Offers More Protection to Food, Drug Consumers

On 9 January 2014, China's top court – the Supreme People's Court ("SPC") announced a judicial interpretation called "*Provisions of the Supreme People's Court on Certain Issues concerning the Application of Law in the Hearing of Cases Involving Food and Drug Disputes*" ("Provisions"). The 18-clause Provisions - along with the revised PRC Consumer Rights and Interests Protection Law – will come into effect on March 15, World Consumer Rights Day and are aimed at offering more protection to food and drug consumers in seeking legal remedies.

According to the calculation of the SPC, during the period from 2010 to 2012, a total of 13,216 food and drug related consumer disputes have been accepted and heard by the courts and the figures keep increasing continuously. The Provisions, which serve as the basis for courts to encourage consumers fighting against manufacturers and retailers of unsafe food and pharmaceuticals, have clarified a number of procedural and substantive standards for the courts to protect consumer' rights.

The following chart will address the highlights of the Provisions.

Procedural Standards on Consumer Protection	
Article	Main Content
Article 14	If the manufacturer or the seller is required to bear, at the same time, civil, administrative and criminal liabilities and their assets are insufficient to cover all the liabilities, the court may support consumers' demand that manufacturers and sellers prioritise payment of damages and compensation to release their civil liabilities first.
Article 2	Consumers may sue manufacturers and sellers of substandard products jointly or severally. If consumers only sue one of them, the court may join other parties to the litigation at its own discretion.
Article 3	Manufacturers and sellers may not use consumers' prior knowledge as a defence to decline the compensation claim of consumers who purchased the substandard products despite of full knowledge of their quality defects.
Article 5	Only a preliminary burden of proof falls on the consumer to prove that the damages were caused by the products in question. In contrast, manufacturers and sellers have to furnish evidences to prove that the damages are not caused by non-compliance with quality standards.
Article 17	Cosmetics and dietary products, even though they are not drugs, are also covered.
Substantive Standards on Consumer Protection	
Article 4	Manufacturers and sellers shall bear legal liability for offering food and drug products as free promotional gifts if they harm customers due to quality problems.
Article 15	Consumers may claim punitive compensations from manufacturers who produce substandard products - and sellers who sell the products knowing they were defective - for 10 times of the price of the purchased product, regardless whether injuries have been caused by the product.

Article 11	Consumers may claim compensation from individuals and institutions, including celebrities, who endorse dishonest food and drug advertisements and products.
Article 9	The providers of online trading platforms will also be punished if they fail to help the consumers maintain their rights while knowing the customers' rights are infringed upon by the food and drug shops operating on their platforms
Article 16	Unfair and unreasonable provisions formulated in the standard-form contracts, notices, statements or announcements provided by manufacturers and sellers to limit or exclude the rights of consumers are deemed to be invalid.

The promulgation of the Provisions has shown the intention of the top court to establish unified judicial standards to ensure the food and pharmaceuticals markets observe best practice and safeguard the rights of consumers.

2. MOFCOM Loosens Control on Cross-border RMB Direct Inbound Investment

In October 2011, MOFCOM (Ministry of Commerce), the primary regulator of foreign-direct investment (“FDI”) matters in China, released the “*Circular on Issues Concerning Cross-Border RMB Direct Investment*” (Circular 889) allowing foreign investors to invest offshore RMB in China. Two years later, on 13 December 2013, MOFCOM issued “*Announcement of the Ministry of Commerce on Issues relating to Cross-border RMB Direct Investment*” (“Announcement No. 87”), which has superseded Circular 889 since 1 January 2014, and is designed to further simplify the cross-border RMB direct inbound investment procedures and improve their supervision.

The key points of Announcement No. 87 are listed below:

1. Definition of RMB FDI

RMB FDI refers to the direct investment activities conducted by foreign investors (including the investors from Hong Kong, Macau and Taiwan) in China with offshore RMB funds obtained legally, including the establishment of new enterprises, capital increases, share subscriptions or M&A of domestic enterprises

Announcement No. 87 removes the limitations on the source of offshore RMB as set in the Circular 889, which only allowed the following two legitimate sources of offshore RMB:

- (1) RMB funds obtained by the foreign investors through settlement from cross-border RMB trade, RMB profits lawfully obtained within the territory of China and remitted out of China, and RMB funds obtained from share transfer, capital reduction, liquidation and early withdrawal of investment; and
- (2) RMB funds obtained outside China by foreign investors through lawful channels, including but not limited to offshore RMB bonds or shares etc.

2. Application Procedures

Foreign investors shall go through the relevant procedures for the cross-border RMB direct investment in accordance with the existing laws, administrative regulations, rules and policies related to foreign investment.

Announcement No. 87 removes certain governmental approval requirements related to special industries and enterprises as set forth in Circular No. 889. Pursuant to Circular No. 899, an application used to be subject to the approval of the provincial and central MOFCOM in any of the following circumstances:

- (1) The registered capital contribution of the project amounts to RMB 300 million or above;
- (2) The investment is in financial guarantees, financial leases, micro-credits, or auctioneer businesses;
- (3) The RMB funds are being used to invest in a foreign-invested holding company, a foreign-invested venture capital enterprise, or a foreign-invested equity investment enterprise; or
- (4) The investment is in industries subject to macro-economic regulatory adjustments and controls (i.e., cement, iron, steel, or electrolytic aluminum production, or ship building).

3. Restrictions on the Use of RMB

Offshore RMB funds cannot be used, directly or indirectly, in negotiable securities and financial derivatives in China (except for strategic investments in listed companies) or for entrusted loans.

4. Special Remarks of MOFCOM's Approval

Approvals issued by the competent commerce authorities shall clearly specify the special remark "offshore RMB investment", the amount of investment and the above-mentioned restrictions on investments.

5. Change of Currency in Capital Injection

If a foreign investor intends to change the original capital contribution currency from foreign currency to RMB, MOFCOM's approval of the revised articles of association and the joint venture contract will be no longer required, which was necessary according to the old Circular No. 889. The foreign investor may directly go through the registration formalities, opening of a bank account, fund transfer and other relevant procedures with the relevant government departments and banks.

6. Re-investment by Using RMB Derived from Investments in China

The relevant existing provisions shall remain applicable where foreign investors make direct investments with onshore RMB dividends gained from their foreign-invested enterprises in China and onshore RMB funds obtained from share transfer, capital reduction, liquidation, and early withdrawal of investments.

3. CSRC Issues Measures to Strengthen IPO Supervision

At the end of year 2013, the China Securities Regulatory Commission ("CSRC") released a long-awaited A-share IPO registration reform plan called "Opinions of the China Securities Regulatory Commission on Further Promoting the Reform of the System of Initial Public Offerings" as an important step to change the current IPO approval regime into a registration regime. Under the new system, the CSRC regulator will only be responsible for examining whether applicants are qualified, leaving investors and the markets to make their own judgment about a company's value and the risks of buying its shares. To further clarify the IPO supervision practice, CSRC unveiled the detailed measures "Measures of the China Securities Regulatory Commission on Strengthening the Regulation of Initial Public Offerings" on 12 January 2014, which become effective on the same day.

Highlights are listed as follows:

1. The issuer and its lead underwriter are not allowed to use the information of the issuer other than the letter of intent and other public information during roadshows. In case of violation of the aforesaid restriction, the offering process will have to be suspended.
2. If the P/E ratio of the proposed issuance price (or upper limit of the issuance price range) is higher than the average P/E ratio on the secondary market of listed companies in the same industry sector, the issuer and its lead underwriter are obligated to make a special announcement on the potential investment risk at least once a week before the online share subscription. The announcement shall cover the following points:
 - a. Analysis on differences between the issuer and other listed companies in the same industry sector and the impact of such differences; analysis on differences with respect to the issuance price and quotations offered by offline investors.
 - b. Draw investors' attention to the potential investment risks, prudently review the reasonableness of the issuance price and make rational investment decisions.
 - c. The issuer shall determine the industry sector in accordance with the Industry Classification Guidelines for Listed Companies and the average P/E ratio for the past month as released by China Securities Index Co., Ltd. shall be used as reference basis.
3. CSRC and China Securities Associations shall make the spot inspection of the quotation offering process by the offline investors. If an offline investor is incapable of pricing, or fails to strictly perform the quotation evaluation and decision-making procedures, or fails to offer prudent quotations, the SAC will block the said offline investor in the blacklist, who will be banned from IPO offline pricing.

© Wenfei, Beijing, February 2014

Check the China Legal Briefing archives on: <http://www.wenfei.com/publications.html>

Obtain your personal subscription from: china@wenfei.com